



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**  
**Civil Case 551 of 1994**

**NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**PETER NYAKUNDI.....1<sup>ST</sup> DEFENDANT**

**ANDREW NYAKUNDI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, National Bank of Kenya Limited sued the defendants Peter Nyakundi and Andrew Nyakundi claiming the sum of Kshs 702,413/90 which it alleged was owed by the defendants as at the 31<sup>st</sup> of July 1994 on account of monies which were lent to the defendants at the defendants' own request and which attracted an agreed interest of 40% per annum. The plaintiff prayed that the defendants be ordered to pay the said sum plus the agreed interest of 40% per annum until payment in full. When the defendants were served, they denied that they owed the said sum to the plaintiff and put the plaintiff to strict proof thereof. They prayed that the plaintiff's suit to be dismissed with costs.

At the hearing of the case, the plaintiff called one witness to prove his case. PW1 Richard Rotich testified that he was the Advances Recoveries Officer at the plaintiff bank. He testified that the 1<sup>st</sup> defendant Peter Nyakundi opened a current account at the bank on the 26<sup>th</sup> of January 1982 (*request to open account produced as plaintiff's exhibit No. 1*). The 1<sup>st</sup> defendant then approached the plaintiff to be offered an overdraft facility. The 1<sup>st</sup> defendant made the application to be granted the overdraft facility on the 2<sup>nd</sup> of January 1987 (*application produced as plaintiff's exhibit No. 2*). The bank responded favourably to the request for a loan made by the 1<sup>st</sup> defendant on the 9<sup>th</sup> of January 1987 (*letter of offer produced as plaintiff's exhibit No. 3*). He testified that prior to the plaintiff granting the said overdraft facility to the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant had been advanced a loan on the security offered of parcel number LR. West Mugirango/Bogichora/893. The said title was duly charged. The copy of the title registered in the name of the 2<sup>nd</sup> defendant Andrew Nyakundi was produced as plaintiff's exhibit No. 4. The charge was prepared and was registered on the 26<sup>th</sup> of March 1985 (*charge produced as plaintiff's exhibit No. 5*).

PW1 testified that they did not prepare a further charge when they advanced the plaintiff the sum of Kshs 50,000/=. He testified that the 1<sup>st</sup> defendant did not repay the sum advanced and on the 25<sup>th</sup> of September 1992 a statutory demand notice was issued to the defendants to the effect that if they did not pay the sum which was then due, the plaintiff was going to realise the security. The defendants did not heed the notice and on the 17<sup>th</sup> of May 1994, Pave Auctioneers Kisii attempted to sell the charge property by public auction but were unsuccessful (*a letter of Pave Auctioneers dated the 19<sup>th</sup> of May 1994 produced as plaintiff's exhibit No. 6*). The firm of advocates who were instructed to give effect to the sale wrote to the

plaintiff and told them of the unsuccessful bid (*letter from Jones & Jones Advocates dated the 30<sup>th</sup> of May 1994 produced as plaintiff's exhibit No. 7*). Prior thereto the said firm of advocates had written a letter to the District Commissioner Kisii informing him of their intention to sell the said property in a public auction as was required by the law (*letter dated 31<sup>st</sup> of January 1994 produced as plaintiff's exhibit No. 8*).

He testified that the bank attempted to sell the said property again in the year 2004 but they were unsuccessful because no bidder was able to make an offer equivalent or more than the reserve price. The second public auction was conducted by Garam Auctioneers (*letter by Garam Auctioneers dated the 22<sup>nd</sup> of May 2004 produced as plaintiff's exhibit No. 9*). Prior to the said sale, the property was advertised for sale after the defendants were duly notified (*notices and copy of the advertisement produced as plaintiff's exhibit No. 10*). He testified that during the entire period from the time the defendants defaulted in paying the loan advanced to them to date, the plaintiff had been in constant touch with the defendants. It was his testimony that whenever the defendants were contacted, they always gave false promises to settle the said amount owing. A bundle of correspondences written by the 1<sup>st</sup> defendant to the plaintiff was produced as plaintiff's exhibit No. 11.

He testified that on 19<sup>th</sup> of December 2002 the 1<sup>st</sup> defendant paid the sum of Kshs 100,000/= towards the reduction of the debt. A copy of the deposit slip was produced as plaintiff's exhibit No. 12. He recalled that prior to the attempted sale by public auction in 2004, the bank had sent a statutory notice to the guarantor i.e. the 2<sup>nd</sup> defendant on the 27<sup>th</sup> of June 2003 (*statutory notice produced as plaintiff's exhibit No. 13*). As at the 13<sup>th</sup> of October 2005, the outstanding amount owed by the defendants was Kshs 4,452,875/65. PW1 testified that the sum of Kshs 50,000/= which the defendants had initially borrowed had now accumulated to Kshs 4.4 million.

He conceded that the said amount included auctioneer's charges and legal fees. He testified that the defendants were liable to pay all the costs that were incurred by the plaintiff in recovering the said amount advanced. He testified that at one time the defendants offered to pay the sum of Kshs 300,000/= in full and final settlement of the debt, but the bank did not accept the defendants' proposal. He conceded that a substantial amount of the amount owed was in form of interest charged. He denied that the amount of interest which was agreed to be charged was 14% per annum. He testified that the interest charged by the plaintiff depended on the interest charged at the market rate. It was his further testimony that whenever the interest rate was varied, the defendants were duly informed. He gave an example of the letter written on the 25<sup>th</sup> of September 1992.

He conceded that the initial attempt to sell the charge property in a public auction in 1994 was illegal because the defendants were not notified. He testified that the total amount that the defendants had paid to off set the said loan advanced to them was Kshs 108,000/= only. He testified that the plaintiff would not accept if the defendants offered to pay the sum of Kshs 50,000/= plus 14% interest per annum. He further testified that apart from the sum of Kshs 50,000/= which the 1<sup>st</sup> defendant initially borrowed, a further sum of Kshs 150,000/= was advanced to him. He recalled that the defendants had made an offer to pay the said loan advanced to them to a maximum amount of Kshs 600,000/=. After the close of the plaintiff's case, the defendants closed their defence without calling any evidence.

I have carefully considered the evidence that was adduced by the plaintiff in this case. I have also considered the submissions which were made by the learned counsel for the plaintiff and the learned counsel for the defendants. The issue for determination by this court is firstly, whether the plaintiff advanced the said sum of money claimed to the defendants. The second issue for determination is on what terms the said money was advanced to the defendants. Certain facts are not in dispute in this case. The 1<sup>st</sup> defendant was a long time customer of the plaintiff. He opened an account with the plaintiff in 1982. In 1985 he was advanced the sum of Kshs 100,000/=. The security that was offered by the 1<sup>st</sup> defendant was parcel No. West Mugirango/Bogichora/893 registered in the name of Andrew Nyakundi, the 2<sup>nd</sup> defendant. It is apparent from the evidence adduced by the plaintiff, that the 1<sup>st</sup> defendant paid off the said sum advanced without any problem.

On the 2<sup>nd</sup> of January 1987, the 1<sup>st</sup> defendant applied to renew the overdraft offered to him by the plaintiff. He applied for the sum of Kshs 50,000/=. The request was granted by the plaintiff on the 9<sup>th</sup> of January 1987. The said letter stated on the material part as follows:

***“all other terms and conditions of this facility remain as stipulated in our letter of offer to you dated the 13<sup>th</sup> of August 1985.”***

This letter of offer was however not produced in evidence by the plaintiff. However it is apparent from the evidence adduced by the plaintiff, and the submission made by both the plaintiff and the defendants that they are both in agreement that the basis upon which the said sum of Kshs 50,000/= was advanced in 1987 was the charge which was registered on the 3<sup>rd</sup> of April 1985. The material part of the said charge instrument states as follows:

***“... provided always that the bank shall not be required to advise me or the borrower prior to any change of the rate of interest so payable and provided further that such interest shall in no event without my consent be charged at a rate exceeding 14 per centum per annum and provided further that the total moneys for which this charge constitutes a security (hereinafter called ‘the charge debt’) shall not at any time exceed the sum of Kenya Shillings one hundred thousand (Kshs 100,000/=) together with interest at the rate or rates aforesaid from the time of the charge debt becoming payable until actual payment thereof and provided further that the security hereby constituted shall be a continuing security for the payment of the sum of Kenya shillings one hundred thousand (Kshs 100,000/-) or so much thereof as may from time to time be outstanding notwithstanding any settlement of the account or other matter....”***

It is therefore clear according to the charge instrument that the plaintiff was required to seek the consent of the defendants before it could vary the interest rate and further that an interest rate of more than 14% per annum could not be charged. It is also clear that the security which was charged could only secure up to the sum of Kshs 100,000/= plus interest.

I therefore am inclined to agree with the submissions made by the defendants that the amount which they ought to have been charged in respect of the said sum of Kshs 50,000/= advanced was the said sum advanced plus 14% interest per annum until the payment in full. The sum to be paid by the defendants in respect of the said loan advanced shall therefore be Kshs 50,000 plus 14% interest per annum from January 1987 to date. The plaintiff did not offer any evidence to this court on the basis upon which interest is calculated by the plaintiff on the loan advanced to its customers. I will therefore calculate the interest payable at the rate of 14% per annum based on the sum said of Kshs 50,000/= which was originally advanced to the defendants. Having calculated the said amount from 1987 to date, I hold that the defendants shall pay the plaintiff the sum of Kshs 644,983/=.

There is evidence that the defendants borrowed another sum of Kshs 150,000/= from the plaintiff on the 20<sup>th</sup> of February 1992. This amount was advanced to the plaintiff as unsecured credit. In respect of the said amount advanced, it is clear that the defendants understood that they were going to repay the said amount with interest that was prevailing at the time. According to the plaintiff the interest which was applicable at the time was 40% per annum. However according to the plaintiff’s witness who testified in court, the interest rate chargeable varied from time to time depending on the market rate. I have perused the exhibits which were produced in court by the plaintiff but unfortunately I am not able to glean the interest rate that was applicable between the year 1994 when the suit was filed and at the time of writing this judgment. I also perused the correspondences which the 1<sup>st</sup> defendant wrote to the plaintiff and I have noted that the 1<sup>st</sup> defendant conceded that the said amount advanced to him was to be paid with interest. By his letter dated the 9<sup>th</sup> of April 2004, he admitted that he was willing to pay the sum of Kshs 1,000,000/= to the plaintiff. It is on record that the 1<sup>st</sup> defendant paid to the plaintiff the sum of 108,000/= in part payment of the said sum due.

I agree with the holding of the Court of Appeal in the case of **Shah –vs- Guilders International Bank Limited [2003] KLR 8** at page 9 where in reference to the provisions of **Section 26(1) of the Civil**

**Procedure Act**, the court held that:

***“We further understand these provisions to be applicable only where the parties to the dispute have not, by their agreement, fixed the rate of interest payable. If by their agreement the parties have fixed the rate of interest payable, then the court has no discretion in the matter and must enforce the agreed rate unless it is shown in the usual way either that the agreed rate is illegal or unconscionable or fraudulent.”***

In this case, there is no evidence that the plaintiff and the defendants agreed on the interest rate to be applied on the subsequent sum of Kshs 150,000/= that was advanced to the defendants. Although the plaintiff now claims that the said amount attracted an interest rate of 40% per annum, there is no evidence that the defendants were aware that this interest would be charged. However the defendants were aware that they would pay the principal sum advanced with an element of interest.

From the correspondences of the 1<sup>st</sup> defendant, it is clear that the defendants understood that they would pay an interest rate of between 20-30% per annum. I therefore hold that the interest rate applicable in respect of the subsequent amount advanced to the defendants of Kshs 150,000/= shall be 25% interest per annum.

In the premises therefore, judgment is entered for the plaintiff against the defendants jointly and severally as hereunder:

- (i) As to the initial sum of Kshs 50,000/= advanced, the defendants shall pay the plaintiff Kshs 644,983/= less the sum of Kshs 108,000/= already paid which shall be Kshs 536,983/=.
- (ii) Kshs 3,774,203/= being the sum of Kshs 150,000/= advanced plus 25% interest per annum.
- (iii) The plaintiff shall have the costs of this suit.
- (iv) Interest on the above amount shall separately be applied at 14% per annum and 25% per annum until the payment in full of the said decretal sum.

**DATED at NAKURU this 15<sup>th</sup> day of June 2006.**

**L. KIMARU**

**JUDGE**